ORIGINAL

No. 90-940

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

EMERY LEATHERS, OFFICER,
Petitioner,

v.

NATHAN MILLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE COURT BELOW APPLIED APPROPRIATE STANDARDS WHEN IT DETERMINED THAT PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT UNDER RULE 56?

2. WHETHER THE COURT BELOW, IN ASSESSING RESPONDENT'S EIGHTH AMENDMENT CLAIM, PROPERLY APPLIED THE STANDARD ANNOUNCED BY THIS COURT IN WHITLEY V. ALBERS WHICH REQUIRES A SHOWING THAT FORCE WAS EMPLOYED "MALICIOUSLY AND SADISTICALLY" FOR THE EXPRESS PURPOSE OF INFLICTING PAIN?

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STATEMENT OF THE CASE

Respondent, Nathan Miller, an inmate at Central Prison in Raleigh, North Carolina, filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina against petitioner, Officer Emery Leathers, a guard at the prison, alleging violations of his rights. (JA 3-9).[1] Miller alleged an excessive use of force by Leathers during an incident that occurred in the prison on January 7, 1987. (JA 4).

The district court entered an order granting petitioner summary judgment pursuant to Fed. R. Civ. P. 56 (Rule 56). Pet. App. at A-31-33. On appeal, a divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court. Pet. App. at A-18-30. The court of appeals granted a petition for rehearing en banc, Pet. App. at A-16-17, and vacated the district court's judgment by a six to four vote. Pet. App. at A-1-14.

The events alleged by Miller in his complaint and supported by his depositions and affidavits are as follows:[2]

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[1] "JA" refers to the Joint Appendix filed with the Fourth Circuit.

[2] Miller's version is disputed by petitioner. Since the issue at the summary judgment stage is whether respondent has presented genuine issues of material fact which should be resolved by a jury, we do not recount petitioner's version of the events. Petitioner's version is restated in his petition. Pet. at 3-5.

On January 3, 1987, plaintiff Miller filed a Grievance Form against Leathers, alleging that Leathers told another inmate that Miller was a "snitch". (JA 230). Miller had hoped to use the prison's grievance procedure to resolve his ongoing difficulties with Leathers. (JA 145). The superintendent of the prison resolved the grievance in Leathers' favor. (JA 230).

On January 7, Leathers delivered the resolved grievance form "with a very nasty attitude" to Miller's cell and told him to sign it. (JA 4). They exchanged obscenities before Miller gave Leathers the signed grievance form, noting his appeal of the superintendent's decision. (JA 5, 147-153, 167-168). Leathers left the cell, promising to return to "kick [Miller's] ass". (JA 149-150). Leathers told Miller, "I'm going to pull you out. I'm going to go get the cuffs--go get the restraints, and pull you out." (JA 170).

Leathers returned and told Miller, "Stick your hands out the door and let me put these cuffs on you." (JA 178). Miller responded, "Why? I don't have an appointment anywhere. You have no reason to take me out of my cell." (JA 5). "You'll see." Leathers said. "Just put your hands through the door, punk." (JA 5).

When the door opened, Leathers stepped so close to Miller that the two men's stomachs may have touched. (JA 181). Leathers, without a superior officer present, ordered Miller to

go downstairs.[3] (JA 181). However, Leathers blocked his path by stepping in front of him which threatened Miller. (JA 181-183). Miller, handcuffed and unable to defend himself, told Leathers to "go ahead" and hit him. (JA 182).

When Leathers finally allowed Miller to pass, Miller hesitated at the top of the stairs. (JA 185). Miller was "paranoid to [go down the stairs], especially in front of [Leathers]. . ." (JA 185). Near the bottom of the stairs, after the two men exchanged more words, Leathers hit Miller in the back with a "rather solid, but not overly painful" blow. (JA 185-186).

Miller interpreted this jab in the back as Leathers' attempt to "start something", and tried to ignore the provocation. (JA 186). At the bottom of the stairs, Leathers hit Miller with the baton again, so hard, that Miller had to do "a little footwork" to keep his balance. (JA 186, 202).

After the second jab with the stick, Leathers ordered Miller to move through the sally port door which was blocked by a food cart. (JA 188). Unable to move forward as ordered, Miller turned around and said "something about [Leathers'] mother". (JA 188). Leathers swung his stick at Miller, and Miller, raising his arms to protect his head, caught the baton between his handcuffs. (JA 188). Miller laughed and told Leathers that his mother or sister could probably hit harder. (JA 188). Leathers

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[3] North Carolina prison regulation NCAC 2F 1502(c)(5)(B) requires that whenever correctional staff removes an inmate from his cell due to the fact that the inmate is causing a disruption, a superior officer must be present.

swung again, and Miller either caught this second blow in the cuffs, or took a hit to his elbow. (JA 215).

Leathers' third swing of the baton struck Miller's lower arm, breaking the bone. (JA 188, 251). Miller told Leathers, "You done broke my arm." Leathers responded, "I'm going to kill you." (JA 219).

Sergeant Walker and Officer Monk arrived. (JA 222-225). Miller claimed that Sergeant Walker told Leathers that he had no business pulling Miller out of his cell. (JA 7). Walker stated in his deposition that "it would have been better not" to have removed Miller from his cell at that time. (JA 104).

Officer Monk escorted Miller to the infirmary. A physician's assistant determined that Miller had been struck on his right wrist and elbow with a baton. (JA 251). An X-ray revealed a fracture of the distal shaft of the right ulna. (JA 251). A short arm cast was applied on January 12, 1987 and removed on March 16, 1987. X-rays showed satisfactory healing. (JA 252).

The district court granted summary judgment to petitioner, concluding, inter alia, that the use of force was reasonable, justified and applied in a good faith effort to discipline Miller. Pet. App. at A-5. A divided panel of the Court of Appeals affirmed. The en banc court reversed the decision. The court, using the standard enunciated in Whitley v. Albers, 475 U.S. 312 (1986), concluded:

> Accepting Miller's version as true, we find that it supports a 'reliable inference of wantonness in the

> infliction of pain'. [citation omitted]. Verbal provocation alone does not justify a response such as occurred in this case, and whether there was any more than verbal provocation by Miller is in genuine issue on any fair reading of this record.

Pet. App. at A-7.

REASONS WHY THE PETITION SHOULD BE DENIED

THE STANDARDS OF REVIEW EMPLOYED BY THE COURT BELOW ARE FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS REGARDING SUMMARY JUDGMENT.

Petitioner contends that the court's reliance on Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979), for a single proposition[4] illustrates that "in evaluating the summary judgment record, [the court below] employed a standard of review which had previously been superseded by rulings of this Court". Pet. at 10. Petitioner further claims that Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), create a more demanding standard for surviving a motion for summary judgment under Rule 56 than the

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[4] The court below relied on Charbonnages for the proposition:

> The facts and inferences to be drawn from the facts must be viewed in the light most favorable to the non-moving party, and this party is entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, and all internal conflicts in it resolved favorably to him".

Pet. App. at A-3 (quoting Charbonnages, 597 F.2d at 414).

court below applied in reaching its decision. Pet. at 11. These characterizations, designed to make this case appear worthy of review, are incorrect.

In 1986, this Court decided a trilogy of summary judgment cases: Celotex Corp. v. Catrett, 477 U.S. 317; Anderson v. Liberty Lobby, Inc., 477 U.S. 242; and Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574 (1986). In large part, these cases are not pertinent to this one. In Celotex, the issue was whether the moving party's failure to support its motion for summary judgment with evidence tending to negate the non-moving party's claim precluded the entry of summary judgment in its favor. 477 U.S. at 319. This Court found "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim". Id. at 323.

Anderson presented "the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which New York Times applies". 477 U.S. at 244 (New York Times Co. v. Sullivan, 376 U.S. 254, 285-286 (1964), held that in a libel suit brought by a public official, the First Amendment requires the plaintiff to show with "convincing clarity" that the defendant acted with actual malice). This Court held that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that

apply to the case". Id. at 255.

Finally, in Matsushita, this Court considered the proper standards for deciding summary judgment motions for claims under Section 1 of the Sherman Act. 475 U.S. at 588. It held, "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of Section 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Id. (citing Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984)). This Court explained that "the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a genuine issue for trial exists within the meaning of Rule 56(e)". Id. at 596. It also concluded, "Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence; if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." Id. at 596-597.

These three cases retained the principle for which the Fourth Circuit cited its own precedent: "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970)); Matsushita, 475 U.S. at 587-588 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). Further, these cases reaffirmed long established principles regarding summary judgment: the genuine

issue of material fact "is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial". 477 U.S. at 249 (quoting First Nat'l Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 288-289 (1968)). Therefore, on motion for summary judgment, the judge determines "whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not". 477 U.S. at 254.

Thus, whether Charbonnages or this Court's authority is cited, the court below applied the correct test when it decided the summary judgment issue. The court concluded, "Miller's version of the incident supports a reasonable inference that Leathers intended to provoke an incident so as to allow Leathers to beat him under the guise of maintaining order or defending himself." Pet. App. at A-5-6. The court reasoned, "The grievance filed by Miller indicates that Leathers may have harbored ill will against him." Pet. App. at A-6. In addition, the court explained, "Leathers' removal of Miller was apparently effected in violation of [a North Carolina prison] regulation, and this undisputed fact further supports an inference that Leathers intended to retaliate against Miller." Id. Further, the court stated, "While [Leather's] arguments may eventually prevail at a later stage of the proceedings, they are inadequate to overcome

the genuine issues of material fact raised by Miller's statements." Id. Hence, the court held, "Accepting Miller's version as true, we find that it supports a 'reliable inference of wantonness in the infliction of pain.'" Pet. App. at A-7. Since the court below used the correct summary judgment standard, no conflict exists with the decisions of this Court.

THE COURT BELOW APPLIED THE EIGHTH AMENDMENT STANDARD ANNOUNCED BY THIS COURT IN WHITLEY V. ALBERS AND DETERMINED THAT PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT UNDER THAT STANDARD. CONSEQUENTLY, THIS CASE DOES NOT PRESENT THE COURT WITH THE QUESTION OF WHETHER WHITLEY IS THE CONTROLLING TEST IN CASES OF INDIVIDUAL INSURGENCY OR INSUBORDINATION BY INMATES.

To be successful, prisoners claiming Eighth Amendment violations must "allege and prove the unnecessary and wanton infliction of pain". Whitley v. Albers, 475 U.S. 312, 320 (1986). This standard is determined in light of "differences in the kind of conduct against which an Eighth Amendment objection is lodged". Id.

In Whitley, a "malicious and sadistic" standard was used to review the shooting of an inmate during a prison riot in which a guard had been taken hostage:

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very

purpose of causing harm".[5] 475 U.S. at 320, 321 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)).

While both petitioner and the dissent below contend that Whitley was not applied by the en banc majority, these contentions are not supportable. The majority opinion explicitly states, "To determine whether the pain inflicted was unnecessary and wanton, a court should consider 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Pet. App. at A-3 (quoting Whitley, 475 U.S. at 320-21).

The true issue presented by this case is factual, not legal. Petitioner and the dissent question whether petitioner's conduct was sadistic and malicious. This fact-bound issue is not worthy of this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041 (1984)(Stevens, J.). Further, the facts alleged are clearly sufficient to prove the sadistic and malicious infliction of pain. According to Miller, he filed a grievance against Leathers, complaining that Leathers told another inmate that Miller was a "snitch". (JA 230). Leathers delivered the grievance, decided in his favor, to Miller for his signature. (JA

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[5] A "deliberate indifference" Eighth Amendment standard is applied in cases where the State's responsibility to provide medical care to the prisoners is the basis for the constitutional claim. See Estelle v. Gamble, 429 U.S. 97, 104 (1976)("deliberate indifference" to a prisoner's serious medical needs constitutes cruel and unusual punishment forbidden by the Eighth Amendment).

230). After an exchange of insults and threats, (JA 5, 147-153, 167-168), Leathers decided to take Miller out of his cell. Despite North Carolina prison regulations requiring a supervisor's presence when a disruptive inmate is removed from his cell, he handcuffed Miller and removed him in the absence of any superior official.[6] (JA 181-185). After more verbal sparring, Leathers swung his riot baton at Miller, who raised his handcuffed hands to protect his head. (JA 188). Miller laughed at the ineffectiveness of this blow, (JA 188), and Leathers struck twice more. The final blow broke Miller's wrist. (JA 188, 215).

Miller's version clearly establishes that Leathers retaliated against Miller's insults by maliciously and sadistically beating him. The petitioner essentially asks the Court to conclude that respondent's racial provocation should control the Whitley analysis. Pet. at 11-12. The majority opinion correctly recognized that verbal provocation alone "does not justify a response such as occurred in this case, and whether there was any more than verbal provocation by Miller is in genuine issue on any fair reading of this record". Pet. App. at

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[6] See NCAC 2F 1502(c)(5)(B). Petitioner responds to this regulation by arguing that Miller was not disruptive at the time Leathers removed him from the cell, and the purpose for removing him was to escort him to a higher authority for an as of yet unexplained purpose. (Pet. at 8, n.4) Petitioner's version at most presents a genuine issue of material fact which must be resolved by a jury and not on motion for summary judgment. A jury must decide if this prison regulation was breached, thereby raising a strong inference that Leathers removed Miller from his cell to beat him and did not want any witnesses present.

A-7. Petitioner's claim that verbal insults authorize a prison guard to administer summary corporal punishment against prisoners has no support in this Court's decision in Whitley or elsewhere.

THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER CIRCUITS REGARDING THE CORRECT EIGHTH AMENDMENT STANDARD TO BE APPLIED WHEN INMATES ARE INJURED BY PRISON GUARDS.

Petitioner also claims that this case is worthy of this Court's plenary review because the circuits are split regarding the application of Whitley's "sadistic and malicious" standard to disciplinary disturbances which fall short of a full-blown prison riot. Pet. at 12.

Whether any split in the circuits even exists is questionable. Petitioner correctly cites cases from the Fifth and Eleventh Circuits which apply Whitley in non-riot situations. Huguet v. Barnett, 900 F.2d 838 (5th Cir. 1990); Bennett v. Parker, 898 F.2d 1530 (11th Cir. 1990); Ort v. White, 813 F.2d 318 (11th Cir. 1987); Brown v. Smith, 813 F.2d 1187 (11th Cir. 1987).

The decision below is not in conflict with these decisions and neither is Corselli v. Coughlin, 842 F.2d 23 (2d Cir. 1988), which petitioner also relies on to create a conflict. After distinguishing Whitley because the incident in Corselli was not a full-scale riot as presented in Whitley, the Second Circuit applied Whitley's "sadistic and malicious" standard to decide that case. Corselli, 842 F.2d at 26. Corselli, then, is fully consistent with the cases from the Fifth and Eleventh Circuits

cited by the petitioner.

An intra-circuit conflict in the Second Circuit may exist, although petitioner does not cite it. Stubbs v. Dudley, 849 F.2d 83 (2d Cir. 1988), cert. denied, 489 U.S. 1034 (1989), does apply the "deliberate indifference" standard in a case involving a non-riot prison disturbance where security concerns were implicated. However, the dissent from the denial of certiorari in that case, identified Corselli as conflicting with Stubbs because Corselli applies Whitley in a non-riot situation. 489 U.S. at 1038.

More importantly, the Stubbs dissent from the denial of certiorari further noted that "no other Court of Appeals has interpreted Whitley as limited to 'full-blown prison riots'". Id. The Fourth Circuit opinion here clearly joins those other circuits that apply Whitley in non-riot situations. Thus, to whatever extent a conflict exists in the Second Circuit, it is not an issue presented in this case because the applicability of the Whitley standard is not in dispute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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